

NO. _____

TERENCE R. SHIELDS
Plaintiff,

V.

GARY HOWARD AND RETRO
MERCANTILE FLATHEAD CITY AND
VINTAGE IN STYLE, INC.
Defendants.

§ **IN THE DISTRICT COURT**
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§ _____ **JUDICIAL DISTRICT**
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§
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§ **OF HARRIS COUNTY, TEXAS**

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES TERENCE R. Shields, hereinafter called Plaintiff, complaining of and about GARY HOWARD and RETRO MERCANTILE FLATHEAD CITY AND VINTAGE IN STYLE, INC., (FLATHEAD CITY), hereinafter called collectively known as Defendants, and for cause of action shows unto the Court the following:

I. DISCOVERY CONTROL PLAN LEVEL

1. Plaintiff intends that discovery be conducted under Discovery Level 2.

II. PARTIES AND SERVICE

2. Plaintiff, TERENCE R. Shields, is an individual whose address is located in Harris County, Texas.

3. Defendant GARY HOWARD, an individual who is a nonresident of Texas, may be served with process at his place of employment at the following address: Retro Mercantile Flathead City and Vintage In Style, Inc., located at 144 Edwards Way, Grants Pass, OR 97526; Or at any other address where he may be located. Service of said Defendant as described above can be effected by certified mail, return receipt requested.

4. Defendant RETRO MERCANTILE FLATHEAD CITY AND VINTAGE IN

STYLE, INC., a Nonresident Corporation, may be served pursuant to sections 5.201 and 5.255 of the Texas Business Organizations Code by serving the registered agent of the corporation, Michele M. Howard, Registered Agent, Retro Mercantile Flathead City and Vintage In Style, Inc., located at 144 Edwards Way, Grants Pass, OR 97526, its registered office. Service of said Defendant as described above can be effected by certified mail, return receipt requested.

5. As a corporation, RETRO MERCANTILE FLATHEAD CITY AND VINTAGE IN STYLE, INC., herein after referred to as FLATHEAD CITY, can only act through its employees. Throughout this Original Petition and any subsequently Amended Petitions, when a reference is made to an act by a FLATHEAD CITY employee, agent, representative, and/or principal, then said reference includes FLATHEAD CITY. If the reference is made to FLATHEAD CITY, then such reference mean by and through GARY HOWARD, its employee, agent, representative, and/or principal.

III. JURISDICTION AND VENUE

6. The subject matter in controversy is within the jurisdictional limits of this court.

7. Plaintiff seeks:

a. only monetary relief of \$100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees.

8. This court has jurisdiction over Defendant GARY HOWARD, because said Defendant purposefully availed himself of the privilege of conducting activities in the state of Texas and established minimum contacts sufficient to confer jurisdiction over said Defendant, and the assumption of jurisdiction over GARY HOWARD will not offend traditional notions of fair play and substantial justice and is consistent with the constitutional requirements of due process.

9. Plaintiff would also show that the cause of action arose from or relates to the contacts of Defendant GARY HOWARD to the state of Texas, thereby conferring specific jurisdiction with respect to said Defendant.

10. Furthermore, Plaintiff would show that Defendant GARY HOWARD engaged in activities constituting business in the state of Texas as provided by Section 17.042 of the Texas Civil Practice and Remedies Code, in that said Defendant contracted with a Texas resident and performance of the agreement in whole or in part thereof was to occur in Texas.

11. This court has jurisdiction over Defendant RETRO MERCANTILE FLATHEAD CITY AND VINTAGE IN STYLE, INC., because said Defendant purposefully availed itself of the privilege of conducting activities in the state of Texas and established minimum contacts sufficient to confer jurisdiction over said Defendant, and the assumption of jurisdiction over RETRO MERCANTILE FLATHEAD CITY AND VINTAGE IN STYLE, INC. will not offend traditional notions of fair play and substantial justice and is consistent with the constitutional requirements of due process.

12. Furthermore, Plaintiff would show that Defendant RETRO MERCANTILE FLATHEAD CITY AND VINTAGE IN STYLE, INC. engaged in activities constituting business in the state of Texas as provided by Section 17.042 of the Texas Civil Practice and Remedies Code, in that said Defendant contracted with a Texas resident and performance of the agreement in whole or in part thereof was to occur in Texas and committed a tort in whole or in part in Texas.

13. Venue in HARRIS County is proper in this cause.

IV. FACTS

14. On or about June 30, 2017 Plaintiff entered into an agreement wherein

Defendants were to build and deliver to the State of Texas, Harris County, Texas a flathead V-8 engine, that was to take approximately nine (9) months to deliver.

15. A flathead V-8 engine can be differentiated from many other internal combustion engine designs by the fact that the entire valve train is located within the block. Flatheads used in automobiles included inline four cylinder engines, straight eights, and even a large V12. Due to the location of the valves inside the engine block, the heads on a flathead engine are typically little more than solid pieces of metal.

16. Modern use of the flathead engines is mainly limited to custom built and restored vehicles, the purpose which Plaintiff planned to use the flathead made the basis of this lawsuit.

17. Plaintiff discussed with Defendants that his primary purpose in starting the project in June, 2017 was to ensure the flathead V-8 was completed prior to the start of the The Race Of Gentlemen (TROG) that was scheduled to be held in the fourth quarter of 2018.

18. TROG, every year for the past 8 years, has been staged on the beaches of New Jersey, is a carnival of vintage speed machines, friendly competition and throwback styling. TROG is fashioned around the idea of history coming alive briefly, if perhaps somewhat nostalgically or whimsically. TROG events are real, jarring and built on the sappiest foundation of all ... friendship.

19. In order to start the project, Defendants required that Plaintiff pay an initial deposit of \$2,000.00, which Plaintiff paid.

20. On or about Mid-2018, Defendant, GARY HOWARD, contacted Plaintiff and informed Plaintiff the motor was close to completion and Defendants needed an additional \$3,500.00 to complete project, which Plaintiff timely paid.

21. After payment of the additional \$3,500.00, Plaintiff requested that Defendants

forwarded him pictures of the actual motor and VIN # of the block. Defendants stated they would do so.

22. Defendants never sent pictures of the actual motor or VIN # of the block, as promised.

23. Plaintiff became suspicious at this point and began to press Defendants for verification of the work actually being done. Defendants now refused to take Plaintiff's telephone calls or to respond to Plaintiff's inquiries regarding the status of verification of the work actually being done.

24. Defendant, GARY HOWARD, eventually instructed Plaintiff to file a complaint with his credit card issuer and that they would refund his monies. Defendant had no intention of completing the work as promised, nor of refunding Plaintiff's monies.

25. As of the date of the filing of this lawsuit, Defendants have wholly failed to provide pictures of the actual motor or VIN # as requested.

26. On or about April, 2019, Plaintiff made demand to Defendant, GARY HOWARD, that Defendants refund his monies, which Defendants have failed and continue to refuse to do so, leaving Plaintiff no choice but to file this lawsuit.

27. On or about August, 2019, Plaintiff sent written demand to Defendant, FLATHEAD CITY, for a full refund by certified mail return receipt requested but to no avail.

V. CAUSES OF ACTION

Count 1

RESPONDENT SUPERIOR AND RATIFICATION

28. Plaintiff incorporates paragraphs 1 through 27 above by reference the same as if fully and completely set forth herein.

29. Plaintiff further shows that whenever in this amended petition it is alleged that Defendant GARY HOWARD did any act or thing, it is meant that the Defendant FLATHEAD CITY'S officers, agents, servants, employees, or representatives did such act and/or when such act was done, it was done with the full authorization or ratification of Defendant FLATHEAD CITY, or was done in the normal and routine course and scope of employment of Defendant's officers, agents, servants, employees or representatives.

30. Defendant FLATHEAD CITY is therefore liable to Plaintiff for the acts/or omissions of any such employees complained of herein under the doctrine of respondent superior.

31. As result of the acts and actions of Defendants, individually and jointly and severally, PLAINTIFF suffered both actual and exemplary damages, loss time, and loss of opportunity, for which he sues.

Count 2
COMMON LAW FRAUD

32. Plaintiff incorporates paragraphs 1 through 31 above by reference the same as if fully and completely set forth herein.

33. A claim for a cause of action for common law fraud is actionable if:

- a. The defendant made a representation to plaintiff.
- b. The representation was material.
- c. The representation was false.
- d. When the defendant made the representation, the defendant
 - (1) knew the representation was false, or
 - (2) made the representation recklessly, as a positive assertion, and without knowledge of its truth.

- e. The defendant made the representation with the intent that plaintiff act on it.
- f. The plaintiff relied on the representation.
- g. The plaintiff caused the plaintiff injury.

34. Defendant FLATHEAD CITY made a representation to Plaintiff that it would build a flathead V-9 within 9 months. The representation was material, but false. When FLATHEAD CITY made the representation it knew it had no intention of building a flathead V-8 as promised, and has not done so as of the filing of this lawsuit. Defendant FLATHEAD CITY made the representation with the intent that Plaintiff act on it. Plaintiff justifiably relied on the representation and forward payments to Defendants as requested, in reliance on Defendants representations. In addition, Plaintiff has suffered from Defendants misrepresentation, as Plaintiff had planned to enroll in a race with his flathead V-8 in 2018. Plaintiff has suffered damages for which he seeks redress.

35. At all times relevant to the issues in the case, GARY HOWARD, was acting within the scope of his employment with FLATHEAD CITY.

36. Defendant, GARY HOWARD's conduct makes it clear this Defendant had no intention of performing when he made the promise to Plaintiff.

37. Defendant, FLATHEAD CITY, benefitted from the fraudulent transaction and had knowledge of the fraud.

38. As a result of the fraud of Defendants, Plaintiff suffered injury and seeks recovery of his actual damages, exemplary damages, pre-judgment interest, post-judgment interest, and court costs.

Count 3
DECEPTIVE TRADE PRACTICES ACT VIOLATIONS

39. Plaintiff incorporates paragraphs 1 through 38 above by reference the same as if fully and completely set forth herein.

39. Pleading in the alternative, and without waiver of the above, Plaintiff asserts that Defendants violated the Texas Deceptive Trade Practices Act (DTPA).

40. The elements of a cause of action for violation of the DTPA are the following:

- a. The plaintiff is a consumer.
- b. The plaintiff can be sued under the DTPA.
- c. The defendant committed one or more of the following wrongful acts:
 - (1) A false, misleading, or deceptive act or practice that is specifically enumerated in the “laundry list” found in the Texas Business & Commerce Code §17.46(b) and that was relied on by the plaintiff to the plaintiff’s detriment,
 - (2) a breach of an express or implied warranty,
 - (3) any unconscionable action or course of action,
 - (4) the use or employment of an act or practice in violation of Texas Insurance Code chapter 541, or
 - (5) a violation of one of the “tie-in” consumer statutes, as authorized by Texas Business & Commerce Code §17.50(h), which are classified as “false, misleading, or deceptive acts or practices.”
- d. The defendant’s action was a producing cause of the plaintiff’s damages.

41. Plaintiff is a consumer and is a person listed in Texas Business & Commerce Code §17.45(4) that sought or acquired goods or services by purchase or lease. Thus, Plaintiff has standing to bring this suit.

42. Plaintiff sought to purchase goods and/or services, one (1) flathead V-8 engine, built to completion by Defendants, that is the subject of this lawsuit. In furtherance of his purchase, Plaintiff paid valuable consideration to Defendants, for which he seeks redress.

43. Defendants are “persons” as defined under Tex. Bus. & Com. Code §17.45(3), for which Plaintiff can maintain this action.

44. Defendants’ deceptive act or practice was committed in connection with the plaintiff’s transaction in purchasing the goods made the basis of this lawsuit, and such conduct is inextricably intertwined with Plaintiff’s purchase of the flathead V-8 engine herein.

45. Defendant FLATHEAD CITY is vicariously liable for the misrepresentations made by Defendant GARY HOWARD.

46. Defendants committed a wrongful act by providing a false, misleading, or deceptive act or practice under the DTPA, as follows:

- a. Causing confusion or misunderstanding about the source, sponsorship, approval, or certification of good or services. Defendants said they would build a flathead V-8 for Plaintiff within 9 months.
- b. Causing confusion or misunderstanding about affiliation, connection, or association with or certification by another. Defendant GARY HOWARD made misleading statements that FLATHEAD CITY would build Plaintiff a flathead V-8 within 9 months.
- c. Representing that good or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities they do not have, or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have. Defendant GARY HOWARD represented to Plaintiff he had full authority to act on behalf of Defendant FLATHEAD CITY.
- d. Advertising goods or services with intent not to sell them as advertised.
- e. Misrepresenting the authority of a salesman, representative, or agent to negotiate the final terms of a consumer transaction.
- f. Falsely representing that work or services have been performed on or parts replaced in good.
- g. Failing to disclose information about goods or services that was known at the time of the transaction if the failure to disclose was intended to induce

the consumer to enter a transaction that the consumer would not have entered into if the information had been disclosed.

47. Plaintiff relied on the false, misleading, or deceptive act or practice to its own detriment. Defendants intended to misrepresent or had knowledge that the representation was untrue.

48. The misrepresentations made by Defendants were of a material fact and not mere puffing or opinion. Defendants acted knowingly and intentionally.

49. Defendants' conduct was an unconscionable action or course of action. An unconscionable act practice is one that, to a consumer's detriment, takes advantage of the consumer's lack of knowledge, ability, experience, or capacity to a grossly unfair degree. Plaintiff shall show that Defendants' conduct was "glaringly noticeable, flagrant, complete and unmitigated." Defendants' wholly took advantage of Plaintiff, in the transaction made the basis of this lawsuit, to a grossly unfair degree, for which Defendants have failed to remedy.

50. Defendants' conduct were a producing cause of the plaintiff's damages.

51. Defendant GARY HOWARD, acted knowingly and intentionally. Defendant had acted with actual awareness of the falsity, deception, or unfairness of the act or practice. Defendant knew the flathead V-8 engine was not built at the time he requested additional monies from Plaintiff, on or about mid-2018.

52. Defendants' conduct caused plaintiff to sustain economic damages and mental anguish damages, for which he sues.

53. As a result of the deceptive trade practices acts of Defendants, Plaintiff suffered injury and seeks recovery of his economic damages, loss time, mental anguish damages, pre-judgment interest, post-judgment interest, court costs, and attorney fees.

54. Plaintiff also seeks additional damages of up to three times the amount of economic and mental anguish damages, as allowed by the DTPA, based on Defendants knowingly or intentional violations of the DTPA.

Count 3
BREACH OF CONTRACT

55. Plaintiff incorporates paragraphs 1 through 54 above by reference the same as if fully and completely set forth herein.

56. Pleading in the alternative, and without waiver of the above, Plaintiff asserts that Defendants breached its contract with Plaintiff.

57. The elements of a cause of action for breach of contract are the following:

- a. There is a valid, enforceable contract.
- b. The plaintiff is a proper party to bring suit for breach of the contract.
- c. The plaintiff, performed, tendered performance of, or was excused from performing its contractual obligations.
- d. The defendant breached the contract.
- e. The defendant's breach caused the plaintiff injury.

58. Defendants made an offer to build and deliver to Plaintiff one flathead V-8 engine for the total price of \$9,000.00. The terms of the offer were clear and definite and Defendant GARY HOWARD was a person authorized to made the offer. Defendants clearly communicated the offer to Plaintiff.

59. Plaintiff timely accepted the terms of the offer and clearly communicated his acceptance to Defendants. Plaintiff timely met Defendants only condition for acceptance of the offer by tendering the required down payment of \$2,000.00, which was accepted and acknowledged by Defendants.

60. Defendants and Plaintiff mutually agreed on all the essential terms of the agreement; that Defendants would build and deliver to Plaintiff, in Harris County, Texas, one flathead V-8 engine within nine (9) months, of the agreement. More than nine (9) months have passed and Defendants have wholly failed to build and/or deliver the flathead V-8 as promised.

61. The parties' agreed was based on consideration and is enforceable, as Defendants have benefitted from payments made by Plaintiff, but have failed to keep their party of the agreement.

62. Plaintiff has fully and/or substantially performed its contractual obligations, and has satisfied all conditions precedent according to the exact terms of the contract.

63. Defendants have wholly failed to fully or substantially perform its contractual obligations and not excuse exist for such failure to perform. Defendants' failure, is without legal excuse, to perform as promised for all or part of the agreement.

64. Defendants' breach is material as Defendants have failed to perform a material obligation or duty required under the contract.

65. Defendants' breach of the agreement has caused Plaintiff to suffer injury, for which he sues.

66. As a result, Plaintiff seeks recovery of his actual damages, including but not limited to quantum meruit, unjust enrichment, lost time, pre-judgment interest, post-judgment interest, court costs, and attorneys fees.

Count 4 CONVERSION

67. Plaintiff incorporates paragraphs 1 through 66 above by reference the same as if fully and completely set forth herein.

68. Pleading in the alternative, and without waiver of the above, Plaintiff asserts that Defendants have converted Plaintiff's personal property, namely the sum of \$5,500.00.

69. The elements of a cause of action for conversion are the following:

- (a) Plaintiff owned, possessed, or had the right to immediate possession of the property.
- (b) The property was personal property.
- (c) The defendants wrongfully exercised dominion or control over the property.
- (d) The plaintiff suffered injury.

70. After it was clear Defendants failed to build as promised, one flathead V-8 engine and deliver same to Plaintiff in Harris County, Texas, Plaintiff demanded the return of the \$5,500.00 paid to Defendants.

71. Defendants have wholly failed to return and refuses to return the \$5,500.00 owned by Plaintiff. Defendants have not earned the \$5,500.00 but continue to exercise full dominion and control over Plaintiff's personal property, in a manner inconsistent with Plaintiff's rights.

72. Defendants conduct is wanton and malicious.

73. Plaintiff has a legal right to possession of his \$5,500.00, for which he sues.

74. As a result, Plaintiff seeks recovery of his actual damages, loss of use, loss of value, interest, pre-judgment interest, post-judgment interest, court costs, and exemplary damages.

VI. DAMAGES

75. Plaintiff incorporates paragraphs 1 through 74 above by reference the same as if fully and completely set forth herein at length.

76. As a direct and proximate result of the occurrences made the basis of this lawsuit, Plaintiff, TERENCE R. Shields, was caused to suffer injury, and to incur the following damages:

- A. Actual damages;
- B. Exemplary damages;
- C. Economic damages;
- D. Mental anguish;
- E. Lost time;
- F. Loss of use;
- G. Loss of value;
- H. Court costs;
- I. Pre-judgment interest;
- J. Post-judgment interest;
- K. Attorneys' fees;
- L. Additional damages as allowed by the DTPA;
- M. All other damages as allowed by law.

VII. CONDITIONS PRECEDENT

77. Plaintiff incorporates paragraphs 1 through 74 above by reference the same as if fully and completely set forth herein.

78. All conditions precedent have been performed or have occurred.

VIII. PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff, TERENCE R. SHIELDS, respectfully prays that DEFENDANTS be tried and upon verdict of the jury request the Court to award to GANNON:

1. Judgment against DEFENDANTS, jointly and severally, for actual damages;
2. Judgment against DEFENDANTS, jointly and severally, for exemplary damages;
3. Judgment against DEFENDANTS, jointly and severally, for economic damages;
4. Judgment against DEFENDANTS, jointly and severally, for mental anguish damages;
5. Judgment against DEFENDANTS, jointly and severally, for lost time damages;
6. Judgment against DEFENDANTS, jointly and severally, for loss of use damages;
7. Judgment against DEFENDANTS, jointly and severally, for loss of value damages;
8. Judgment against DEFENDANTS, jointly and severally, for Pre-Judgment and post-judgment interest at the rate allowed by law until paid;
9. Reasonable and necessary attorney fees incurred, as allowed by law;
10. Judgment against DEFENDANTS, jointly and severally, additional damages as allowed by the DTPA;
11. Cost of court; and
12. Such further relief at law or in equity to which PLAINTIFF may show himself justly entitled.

Respectfully submitted,

Law Office of Henry L. Robertson PLLC

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